SIVAKADATCHAM P SETHURAM VANDAYAR v. CIMB BANK BHD (PREVIOUSLY KNOWN AS BUMIPUTERA-COMMERCE BANK BHD)

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MARY LIM JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: P-02-(IM)-853-04-2018]
11 MARCH 2019

CIVIL PROCEDURE: *Service – Service of cause papers – Whether service of originating summons in compliance with mandatory four clear days requirement – Reckoning of four clear days under O. 83 r. 2(2) of Rules of Court 2012 – Whether Saturdays and Sundays excluded – Whether ought to be set aside ex debitio justitiae – Whether action time barred*

LAND LAW: *Order for sale – Setting aside – Whether order for sale regularly obtained – Whether service of originating summons in compliance with mandatory four clear days requirement – Reckoning of four clear days under O. 83 r. 2(2) of Rules of Court 2012 – Whether Saturdays and Sundays excluded – Whether ought to be set aside ex debitio justitiae – Whether action time barred – Whether cause to contrary shown*

The appellant ('defendant'), by encl. 6, sought to set aside the order for sale granted by the court. The grounds relied on by the defendant in his application were that: (i) the order for sale was irregular for non-compliance of O. 83 r. 2(2) of the Rules of Court 2012 ('ROC') and should be set aside *ex debitio justitiae*; and (ii) there was cause to the contrary as the respondent's ('plaintiff') action was time-barred under s. 21 of the Limitation Act 1953 ('LA'). For the first ground, the defendant submitted that the defendant was not given any opportunity to contest the application as there was non-compliance of the mandatory four clear day rule prescribed under O. 83 r. 2(2) of the ROC in the service of the originating summons ('OS'). The defendant submitted that he received the OS dated 3 July 2017 and the affidavit in support affirmed on 18 August 2017 on 5 September 2017, the day of the hearing of the OS and the order for sale granted. The defendant contended that both the days of posting and the day of hearing had to be discounted because of the requirement of four clear days. Further, the intervening days also had to be discounted because they comprised weekends and/or public holidays.

Held (allowing appeal with costs; setting aside order of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) There was an insufficient number of the mandatory four clear days as stipulated under O. 83 r. 2(2) of the ROC. Both Saturdays and Sundays are weekly holidays. Order 3 r. 2(1) of the ROC stipulates that the reckoning of any period of time fixed by the ROC for the doing of any

act shall be reckoned according to the provisions in r. 2. Further, with the implementation of a five working-day policy *vide* Pekeliling Perkhidmatan Bil 13 Tahun 2005, Saturdays and Sundays were considered weekly holidays. Therefore, the reckoning of the four clear days under O. 83 r. 2(2) must be undertaken according to r. 2 and both Saturdays and Sundays were excluded. With the mandatory exclusion, there was clearly insufficient four clear days intervening between the posting of the OS and the supporting affidavit on 25 August 2017 and, the first day of hearing on 5 September 2017. The order for sale was thus irregular and must be set aside *ex debitio justitiae*. (paras 6, 9, 11, 14 & 15)

(2) The limitation period of 12 years only runs from the date of default when the Form 16D notice was issued *ie*, on 12 August 2015. The sum claimed included interest that ran from either 1987 or 1990 which was obviously time barred under s. 21(5) of the LA. There had been an earlier order for sale against the same property and the auction was scheduled for 5 March 2003. However, the auction did not proceed due to partial payment made by the defendant. Even if the limitation period of 12 years was taken from the date of last payment, the fresh OS was still caught by the statute of limitation. (paras 20-23)

(3) The earlier foreclosure proceedings could not have been undertaken in law unless and until the plaintiff had already issued the Form 16D notice under s. 256 of the National Land Code. Form 16D notice must have been issued in 1987 for the matter of default to arise and for the plaintiff to avail itself of that remedy for an order for sale. The plaintiff could not be repeatedly approaching the court, not for a fresh date of auction, but for a fresh order for sale, without standing accused of abuse of process. Further, to accede to the plaintiff's argument would mean that the plaintiff could continue issuing fresh Form 16D notices rendering the limitation period under s. 21 of the LA meaningless. This would run contrary to the principles of limitation laws. The foreclosure proceedings initiated in 2017 was clearly time barred. (paras 24-26)

Bahasa Malaysia *Headnotes*

Perayu ('defendan'), melalui lampiran 6, memohon pengetepian perintah jualan yang diberi mahkamah. Alasan-alasan yang disandar oleh defendan dalam permohonannya adalah: (i) perintah jualan tidak teratur kerana ketidakpatuhan A. 83 k. 2(2) Kaedah-kaedah Mahkamah 2012 ('KKM') dan wajar diketepikan *ex debitio justitiae*; dan (ii) terdapat sebab bertentangan kerana tindakan responden ('plaintif') terhad oleh had masa bawah s. 21 Akta Had Masa 1953 ('Akta'). Untuk alasan pertama, defendan menghujahkan bahawa responden tidak diberi peluang mencabar permohonan kerana terdapat ketidakpatuhan kaedah mandatori empat hari yang diperuntukkan bawah A. 83 k. 2(2) KKM dalam penyampaian saman pemula ('OS'). Defendan menghujahkan bahawa dia menerima OS bertarikh 3 Julai 2017

dan afidavit sokongan yang diikrarkan pada 18 Ogos 2017 pada 5 September 2017, iaitu hari pendengaran OS dan perintah jualan diberikan. Defendan menghujahkan bahawa kedua-dua hari pengeposan dan hari pendengaran mesti ditolak disebabkan keperluan empat hari genap. Selanjutnya, hari-hari pencelah juga perlu ditolak kerana hari-hari itu termasuk hari kelepasan mingguan dan/atau cuti umum.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Jumlah empat hari genap mandatori seperti yang diperuntukkan bawah A. 83 k. 2(2) KKM tidak mencukupi. Kedua-dua hari Sabtu dan Ahad, adalah hari kelepasan mingguan. Aturan 3 k. 2(1) KKM memperuntukkan bahawa menghitung apa-apa tempoh masa yang ditetapkan bawah KKM untuk membuat apa-apa tindakan wajar dihitung menurut peruntukan dalam k. 2. Selanjutnya, dengan penguatkuasaan polisi lima hari bekerja melalui Pekeliling Perkhidmatan Bil 13 Tahun 2005, hari Sabtu dan Ahad dianggap hari kelepasan mingguan. Oleh itu, menghitung empat hari genap bawah A. 83 k. 2(2) mesti dibuat menurut k. 2 dan kedua-dua hari Sabtu dan Ahad dikecualikan. Dengan pengecualian mandatori ini, jelas terdapat ketidakcukupan empat hari genap antara pengeposan OS dan afidavit sokongan pada 25 Ogos 2017 dan hari pertama pendengaran pada 5 September 2017. Oleh itu, perintah jualan tidak teratur dan mesti diketepikan *ex debitio justitiae*.

(2) Tempoh had masa 12 tahun hanya bermula dari tarikh keingkaran apabila notis Borang 16D dikeluarkan iaitu pada 12 Ogos 2015. Jumlah yang dituntut termasuk faedah yang berturutan dari sama ada tahun 1987 atau 1990 yang jelas terbatas oleh had masa bawah s. 21(5) Akta. Terdapat perintah jualan yang lebih awal terhadap hartanah yang sama dan lelongan dijadualkan pada 5 Mac 2003. Walau bagaimanapun, lelongan itu tidak diteruskan kerana bayaran sebahagian yang dibuat oleh defendan. Walaupun tempoh had masa 12 tahun dikira dari tarikh bayaran terakhir, OS baru masih dibelenggu statut had masa.

(3) Prosiding penebusan awal tidak mungkin boleh dibuat bawah undang-undang kecuali dan sehingga plaintif mengeluarkan notis Borang 16D bawah s. 256 Kanun Tanah Negara. Borang 16D seharusnya telah dikeluarkan pada 1987 untuk perkara keingkaran timbul dan untuk plaintif mendapatkan remedi perintah jualan. Plaintif tidak boleh berulang alik ke mahkamah, bukan untuk tarikh lelongan baru, tetapi untuk perintah jualan baru, tanpa dipersalahkan atas penyalahgunaan proses. Selanjutnya, untuk menyetujui hujahan plaintif bermaksud

A plaintif boleh meneruskan dengan pengeluaran notis Borang 16D dengan itu menjadikan tempoh had masa bawah s. 21 Akta tiada makna. Ini bertentangan dengan prinsip undang-undang had masa. Prosiding penebusan yang dimulakan pada 2017 jelas terbatas oleh had masa.

Case(s) referred to:

B *Aje Best-On Sdn Bhd v. YB Ahmad Omar & Anor [2000] 3 CLJ 515 HC* ***(refd)***
Dato' Muhammad Hamzah v. RHB Bank Bhd [2018] 1 LNS 1272 CA ***(foll)***
Jigarlal K Doshi v. Resolution Alliance Sdn Bhd & Another Appeal [2012] 1 LNS 811 CA ***(refd)***
Lim Ban Hooi & Anor v. Malayan Banking Bhd [2018] 6 CLJ 545 CA ***(foll)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
C *Peh Lai Huat v. MBf Finance Bhd [2009] 5 CLJ 69 CA* ***(refd)***
Sivadevi Sivalingam v. CIMB Bank Bhd [2018] 1 LNS 511 CA ***(foll)***
Wan Zubaidah Wan Mahmood & Anor v. CIMB Bank Bhd [2018] 1 LNS 768 CA ***(foll)***

Legislation referred to:

Holidays Act 1951, s. 2
D Interpretation Acts 1948 and 1967, ss. 3, 12, 54(1)
Limitation Act 1953, s. 21(5)
National Land Code, s. 256(3)
Rules of Court 2012, O. 3 r. 2(1), O. 83 r. 2(2), (4), (5)

For the appellant - Kanesan Muthusami & Shaarmila Kanesan; M/s M Kanesan & Assocs
E *For the respondent - Chung Tze Yau & Lim Yi Ying; M/s Khor, Ong & Co*

[Editor's note: For the High Court judgment, please see CIMB Bank Bhd v. Sivakadatcham P Sethuram Vandayar [2018] 1 LNS 756 (overruled).]

Reported by S Barathi

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JUDGMENT

Mary Lim JCA:

[1] This is an appeal against the dismissal of the defendant's application (encl. 6) to set aside the order for sale granted by the court on 5 September
G 2017. The learned Judicial Commissioner found that the defendant had failed to show any cause to the contrary as required under s. 256(3) of the National Land Code. After hearing both learned counsel and upon consideration of the records of appeal and the relevant legal principles, we allowed the appeal.

[2] By encl. 6, the appellant who was the defendant at the High Court and
H who we will address as he was at the High Court, applied to set aside the order for sale made on 5 September 2017 *vide* "OS application", on the following two primary grounds:

(i) *ex debitio justitiae* because the order for sale is irregular for non-
I compliance of O. 83 r. 2(2) of the Rules of Court 2012;

(ii) there was cause to the contrary as the plaintiff's action was time-barred under s. 21 of the Limitation Act 1953.

[3] Dealing with the first ground that the order for sale is irregular and should be set aside *ex debitio justitiae*, learned counsel for the defendant submitted there has been a breach of natural justice as the defendant was not given any opportunity to contest the "OS application". There was non-compliance of the mandatory four clear day rule prescribed under O. 83 r. 2(2) of the Rules of Court 2012.

[4] The originating summons dated 3 July 2017 and the affidavit filed in support affirmed on 18 August 2017 were posted on 25 August 2017. Both documents were received by the defendant on 5 September 2017, the day of the hearing of the originating summons. On that same date, the order for sale was granted. The defendant contended that both the days of posting, 25 August 2017 and the day of hearing, 5 September 2017, had to be discounted because of the requirement of four clear days. Next, the intervening days also had to be discounted because they comprised weekends and/or public holidays:

(i) 26 August 2017 – Saturday

(ii) 27 August 2017 – Sunday

(iii) 31 August 2017 – National Day

(iv) 1 September 2017 – Hari Raya Haji

(v) 2 September 2017 – Saturday

(vi) 3 September 2017 – Sunday

(vii) 4 September 2017 – public holiday (SEA Games)

[5] Whilst not denying those timelines, the plaintiff contended that the service was nevertheless regular. The documents were said to have been served on the defendant the moment they were sent by registered post. This was accepted by the learned Judicial Commissioner who also found the service in accordance with the terms and conditions as stipulated in the relevant charge and annexure. The learned Judicial Commissioner was of the view that following s. 2 of the Holidays Act 1951 and, ss. 3 and 12 of the Interpretation Acts 1948 and 1967, only Sunday was a public holiday. The two Saturdays were not public holidays. Consequently, only the two Sundays together with the public holidays of the National Day, Hari Raya Haji and the declared public holiday of 4 September 2017, were excluded for the purpose of computing the four clear days. There were four clear days comprising 26 August 2017 (Saturday), 28 August 2017 (Monday), 29 August 2017 (Tuesday), 30 August 2017 (Wednesday) and 2 September 2017 (Saturday).

[6] We are of the view that the order of sale dated 5 September 2017 has been irregularly obtained and the defendant is entitled to have the order set aside *ex debitio justitiae*. Quite obviously, there is an insufficient number of the mandatory four clear days as stipulated under O. 83 r. 2(2):

A **2. Claims for delivery of possession or payment of moneys (O. 83 r. 2)**

(1) Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge or both, the following provisions of this rule shall apply.

B (2) Not less than four clear days before the day fixed for the first hearing of the originating summons the plaintiff shall serve on the defendant the originating summons and a copy of the affidavit in support of the summons.

[7] There is no dispute that four clear days are required under O. 83 C r. 2(2). There is also no dispute that but for the matter of the Saturdays, there is insufficient number of clear days before 5 September 2017, the first day of hearing of the originating summons.

[8] Hence, the real issue is whether Saturdays are part of the weekly holidays or are Sundays the only recognised weekly holidays. It is the D submission of the defendant that both Saturdays and Sundays are weekly holidays whereas the plaintiff maintained that only Sundays are. Consequently, Saturdays are reckonable days.

[9] In our opinion, both Saturdays and Sundays are weekly holidays. Our E reasoning is rather simple. For the purpose of computation of the timelines under the Rules of Court 2012, O. 3 applies. Specifically, O. 3 r. 2 of the Rules of Court 2012 states:

2(1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.

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(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) Where an act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that G date.

(4) Where an act is required to be done within a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where, apart from this paragraph, the period in question, being a H period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.

[10] Similar timelines can be found under the Interpretation Acts 1948 and 1967. Under s. 54(1), in computing time for the purposes of any written law:

I (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;

(c) …; and

(d) where any act or proceedings is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

[11] In this appeal, the Rules of Court 2012 will prevail since O. 3 r. 2(1) has specifically stipulated that the reckoning of any period of time fixed by these Rules for the doing of any act shall be reckoned according to provisions in r. 2. Therefore, the reckoning of the four clear days under O. 83 r. 2(2) must be undertaken according to r. 2. It is only where the terms of r. 2 are unclear that guidance or clarification may be sought from elsewhere. As we see it, that recourse is not necessary.

[12] For the purposes of this appeal, rr. 2(4) and (5) are relevant. Rule 2(4) requires that at least the four clear days must exist or intervene between the day on which the service of the OS and the supporting affidavit and the day of the first hearing of the OS, if the act to be done calls for that act to be done within a specified number of clear days. Rule 2(5) on the other hand stipulates that where a period in question is a period of seven days or less (and that would include the four clear days under O. 83 r. 2(2) in this appeal), includes the day before a weekly or public holiday, that day shall be excluded. In other words, the weekly or public holiday is to be excluded.

[13] The reasoning for this is quite plain. Weekly or public holidays mean that there will be no office hours for filing of any documents and no registry to cater to that filing. Emergencies aside, the hearing or attendance in court also cannot place.

[14] With effect from 1 July 2005, a five working-day policy or rule was implemented *vide* Pekeliling Perkhidmatan Bilangan 13 Tahun 2005. Pursuant to this Service Circular, the five working-day rule meant that the weekly holidays were now both Saturdays and Sundays:

> 4. Bagi negeri di mana Ahad merupakan Hari Rehat Mingguan, dengan pelaksanaan Lima Hari Bekerja Seminggu maka Hari Rehat Mingguan bagi negeri berkenaan adalah hari Sabtu dan hari Ahad. Manakala bagi negeri di mana hari Jumaat merupakan Hari Rehat Mingguan, dengan pelaksanaan Lima Hari Bekerja Seminggu, Hari Rehat Mingguan bagi negeri berkenaan adalah pada hari Jumaat dan Sabtu.

[15] Consequently, for the purposes of reckoning the four clear days under O. 83 r. 2(2), both Saturdays and Sundays are excluded. With this mandatory exclusion, there was clearly insufficient four clear days intervening between the posting of the originating summons and the supporting affidavit on

25 August 2017 and, the first day of hearing on 5 September 2017. The order of sale ordered on the first day of hearing on 5 September 2017 was thus, irregular and must be set aside *ex debitio justitiae*.

[16] On this ground alone, the appeal must be allowed. The High Court decision of *Aje Best-On Sdn Bhd v. YB Ahmad Omar & Anor* [2000] 3 CLJ 515 which was cited in support is of no assistance as it was decided prior to the implementation of Pekeliling Perkhidmatan Bilangan 13 Tahun 2005.

[17] As for the second ground that was relied on to show the presence of contrary factors for which the order of sale ought not to have been ordered, we also agree with the submissions of the defendant, that the originating summons was initiated outside the limitation period that is prescribed under s. 21 of the Limitation Act 1953. The defendant contended that the 12-year period under s. 21 runs from the date of default in servicing the loan, and not from the date of the issue of the Form 16D notice under the National Land Code.

[18] In this regard, we rely on several recent decisions of this court; namely *Sivadevi Sivalingam v. CIMB Bank Berhad* [2018] 1 LNS 511; *Lim Ban Hooi & Anor v. Malayan Banking Bhd* [2018] 6 CLJ 545; *Wan Zubaidah Wan Mahmood & Anor v. CIMB Bank Berhad* [2018] 1 LNS 768; and *Dato' Muhammad Hamzah v. RHB Bank Bhd* [2018] 1 LNS 1272; [2018] MLRAU 1. These decisions have departed from the earlier decisions of *Peh Lai Huat v. MBF Finance Bhd* [2009] 5 CLJ 69; [2011] 3 MLJ 470 and *Jigarlal K Doshi v. Resolution Alliance Sdn Bhd & Another Appeal* [2012] 1 LNS 811; [2013] 3 MLJ 61.

[19] In *Sivadevi Sivalingam*, the Court of Appeal opined as follows, the views of which we adopt and apply in this appeal:

> [64] The provision granting the right to sell charged land is in section 254 of the National Land Code, facilitated by the procedural rules in Order 83 of the Rules of Court 2012. The 12-year period commences a month after the breach or after the chargor has been deprived of the right to receive the money accruing under the charge. This period does not alter the underlying contractual relationship between the parties. The *in rem* right over the subject land is conferred by reason of the contractual agreement between the parties and that right is fortified in law in that it is recognised as a valid registrable encumbrance over the subject land. Without the underlying contractual relationship, and absent of any breach, the chargee not only cannot but has no right to approach the Court under the terms of the National Land Code 1965 and Order 83 of the Rules of Court 2012 for an exercise of the statutory right of sale. The right to pursue this statutory remedy is triggered by an event of breach or default in the underlying contractual agreement and in the terms of the charge – see Federal Court decision in *S&M Jewellery Trading Sdn Bhd v. Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717.

[65] If the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal*, the time requirements of "at least one month or such other alternative period as may be specified in the charge" mentioned in section 253, would have been rendered meaningless and of no effect. If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the *ad rem* right of order of sale.

[66] The laws of limitation are intended to protect the rights of all parties concerned. These laws lend certainty and confidence to the enforcement and safeguarding of rights and remedies and recourse to the Courts, preventing abuse through the principle of laches. This was discussed in the Supreme Court decision in *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 1 MLJ 409:

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

[67] The Supreme Court further opined that the laws on limitation are "promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litum* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the Courts.

…

[76] Clearly, the statutory provisions have to create, provide or define some right in order to be considered substantive law. It is our respectful view that the terms of section 256 do not meet that criterion. In the first place, Chapter 3 of the National Land Code 1965 itself describes the provisions in this Chapter as containing the provisions on the remedy of a sale in respect of charges. And, section 253 fortifies that intent when it states that the "Purpose and scope of this Chapter" is "to have effect for the **purpose of enabling** any chargee to obtain the sale of the land or lease to which this charge relates **in the event of a breach** by the chargor **of any of the agreements on his part expressed or implied** therein."

[77] Sections 254 to 256 provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the Court for the remedy of an order for sale of the charged land is still dependent on there being a breach of the express or implied agreements. The express agreements are to be found in the charge documents, while the implied agreements

A are as provided under section 249 of the National Land Code. As expounded by the Federal Court in *S&M Jewellery Trading Sdn Bhd v. Fui Lian-Kwong Hing Sdn Bhd [supra]*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge.

B [78] Since section 253 clearly refers to a breach which already exists, and that it is this breach which triggers the right of action or cause of action in favour of the chargee bank to enforce the charge, activating the mechanism under the National Land Code cannot mean that the breach which allowed the chargee bank to invoke the mechanism in the first place is avoided. Section 256 merely affords the chargor the opportunity to C remedy the breach before the application for an order of judicial sale may be sought. Once that breach has been remedied, the breach or default ceases and the chargee bank may no longer approach the Court for an order of sale. As mentioned earlier, the Federal Court had decided in *Jacob* that the Form 16D Notice is to give the charger sufficient notice before the chargee bank can go to Court for an order of sale.

D [79] We find further support for this in the view of learned author Judith Sihombing in *National Land Code: A Commentary (Second Edition)* at page 566:

> The power of sale can be exercised on the breach of any covenant, not only on the breach of the covenant to pay. Thus, breach, of E any agreement implied into the charge under sections 249 to 251 or any express agreements inserted by the parties, will give rise to the right to seek exercise of the power of sale.

[80] In our view, the fact that s. 256(2) expressly provides that the application for sale shall be dealt with in accordance with the provisions F of any law relating to civil procedure for the sale of land which is for the time being in force, and O. 83 is that specific procedural law for the purpose of charges, foreclosures and for sale of land, does not alter the status of s. 256 as procedural law in effect. This provision merely provides for the manner and the authority which has been vested with the power to make that order for sale.

G [81] We are convinced that the appeal is therefore with merit and the appeal is consequently allowed. The foreclosure action is clearly time-barred in which case, the appellant has shown that there is cause to the contrary as to why the order for sale is bad in law and cannot be ordered. The order of the High Court is hereby set aside. (emphasis added)

H **[20]** We further cannot agree with the contention of the plaintiff that the limitation period of 12 years only runs from the date of default when the Form 16D notice is issued, which is 12 August 2015 by reason of the plaintiff's own actions.

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[21] The evidence revealed that the principal sum borrowed was a sum of RM192,000. *Vide* Form 16D, the plaintiff now claims a sum of RM645,647 as at 9 June 2015. That sum patently includes interest that runs from either 1987 or 1990, as can be seen from the statement of account shown by the appellant; and is also obviously time-barred under s. 21(5) of the Limitation Act 1953.

[22] *Vide* Originating Summons No. 31-191-1987, the plaintiff initiated foreclosure proceedings against the same property for the same debt. An order for sale was granted by the High Court sitting at Penang and the auction was scheduled for 5 March 2003. This is evident from para. 22 of the affidavit in reply filed by the plaintiff, and the order of the court dated 17 December 2002.

[23] We understand that the public auction did not proceed due to some partial payment of RM10,000 by the defendant. That was sometime in 2003. We agree with the defendant that even if the limitation period of 12 years was taken from this date of last payment, the fresh or second set of OS application made in 2017 is still caught by the statute of limitation.

[24] We are of the view that those earlier foreclosure proceedings could not have been undertaken in law unless and until the plaintiff had already issued the Form 16D notice under s. 256 of the National Land Code. That Form 16D notice must have been issued in 1987 for the matter of default to arise and for the plaintiff to avail itself of that remedy for an order for sale.

[25] Under such circumstances, there is clear evidence to the contrary that the order for sale this time round ought not to have been granted. In fact, even under the authority of *Jigarlal K Doshi (supra)*, the second foreclosure proceedings initiated in 2017 wherein the order for sale was granted on 5 September 2017, is clearly time-barred. The cause of action had crystallised earlier for the plaintiff to first approach the court in 1987 for its remedy of sale, thereby enforcing its rights under the charge. The plaintiff cannot be repeatedly approaching the court, not for a fresh date of auction, but for a fresh order of sale, without standing accused of abuse of process.

[26] To accede to the plaintiff's argument will mean that the plaintiff can continue issuing fresh Form 16D notices rendering the limitation period under s. 21 of the Limitation Act 1953, quite meaningless. This will run contrary to the principles of limitation laws as explained earlier in the decision of *Sivadevi*. In applying the Supreme Court's decision in *Credit Corporation (M) Bhd v. Fong Tak Sin*, the Court of Appeal reminded that limitation laws are intended to protect all parties, and if no action is taken for a long time [in this case over 30 years], one of two presumptions that operate is that the right of action is "non-existent."

[27] We therefore agree with the defendant that he has amply shown cause to the contrary under the terms as set out in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77. The notice issued demands sums which are time-barred and which are not lawfully due to the plaintiff.

[28] The learned Judicial Commissioner had plainly fallen into error in dismissing the defendant's application and no appellate court should leave such erroneous decision unaddressed or redressed.

Conclusion

[29] For all reasons discussed above, we found the appeal to be of merit. We allowed this appeal with costs and set aside the decision of the order of the High Court. Although the appellant/defendant had canvassed several other grounds, we do not see the need to deal with them as these two reasons are sufficient to warrant appellate intervention.

[30] We further allowed the defendant's application in encl. 6 in terms of para. (1) and set aside the order of sale granted on 5 September 2017.